STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 13, 2014
v	No. 310328 Crawford Circuit Court
PAUL BARRY EASTERLE, Defendant-Appellant.	LC No. 11-003226-FC

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, assault with a dangerous weapon, MCL 750.82, and domestic assault, MCL 750.81(2). He was sentenced to 25 to 40 years' imprisonment for the second-degree murder conviction, 32 months to four years' imprisonment for the assault with a dangerous weapon conviction, and 93 days for the domestic assault conviction. We affirm.

I. FACTUAL BACKGROUND

On July 3, 2011, defendant shot and killed Mark Easterle, his brother, with a .45 caliber handgun. Defendant had a cabin two doors down from his brother's cabin. On the day of the shooting, Judy Easterle, defendant's wife, sought help from Mark Easterle. Judy apparently told Mark that defendant was scaring her and that she was afraid defendant was going to hurt her. Mark and defendant engaged in a verbal altercation that devolved into a fistfight. Both brothers were cursing and yelling at each other and sometime during their fight, defendant apparently injured Judy, who then called for help. Jon Gravelle and Jeff Richards, Mark's son-in-laws, came down to defendant's cabin to help, and Julie Gravelle, Mark's stepdaughter, followed. All three of them were eyewitnesses to the shooting. Jon testified that he entered defendant's house, saw signs that the brothers had been fighting, and convinced Mark to leave with him. Richards testified that he was helping Judy away from defendant's house when he saw defendant follow Mark and Jon out of the house with a gun. Julie also testified that she saw defendant follow them out with a gun. All three witnesses testified that defendant pointed the gun at Mark and that Mark made some type of gesture that they understood to be non-threatening. None of them saw Mark actually touch defendant's gun. Instead, the testimony indicated that defendant either moved his arm or took a step back and pulled the trigger. Mark fell down, bleeding. From the beginning defendant asserted that Mark had made some sort of contact with the gun before it

went off and that he had believed the gun did not have a round in the chamber until Mark touched the gun. Mark died from the gunshot wound.

Defendant was arrested at the scene and agreed to give a statement. Defendant also consented to a video-recorded interview at the police station and filled out a written statement. Additionally, the police conducted on-scene audio-recorded interviews with the eyewitnesses and they gave written statements.

II. HEARSAY STATEMENTS

On appeal, defendant first argues that the witnesses' on-scene audio-recorded statements and written statements were erroneously admitted because they are inadmissible hearsay. However, before trial, defendant and his trial counsel both indicated that they had no objection to the admission of the statements into evidence. A defendant may not waive objection regarding an issue during trial and then subsequently raise it as an error on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Waiver extinguishes any error because the party's affirmation intentionally relinquishes or abandons a known right. *Id*. at 215-216. Nevertheless, we address the claimed errors below in the context of defendant's claim of ineffective assistance of counsel.

III. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING FAILURE TO OBJECT TO ALLEGED HEARSAY

Defendant argues that defense counsel was ineffective for failing to object to the admission of the eyewitnesses' on-scene audio statements and written statements. "Generally, a motion for a new trial or for an evidentiary hearing is a prerequisite to appellate review of a claim of ineffective assistance of counsel." *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). As defendant did not move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. See *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Defense counsel has wide discretion as to matters of trial strategy. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Declining to raise objections to evidence can be trial strategy. *People v Unger*, 278 Mich App 210, 242, 253; 749

NW2d 272 (2008).

Our review of the challenged statements shows that, although hearsay, all three audio-recorded statements and Jon Gravelle's and Richards' written statements were admissible under the excited utterance hearsay exception. MRE 803(2). As a general rule, hearsay—an out-of-court statement offered to establish the truth of the matter asserted—is generally inadmissible unless it falls into a hearsay exception. MRE 801(c); MRE 802. Under MRE 803(2), ordinarily inadmissible hearsay may be admissible as an "excited utterance." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). MRE 803(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Accordingly, an excited utterance is admissible when (1) there is a startling event, and (2) the resulting statement is made while under the excitement caused by the event. *Id*. Furthermore, the statement must also relate to the startling event. *People v Verburg*, 170 Mich App 490, 495; 430 NW2d 775 (1988). Here, there is no dispute that a startling event (i.e., the shooting) occurred and that the challenged statements related to the startling event. Thus, the issue is whether the challenged statements were made while the witnesses were under the excitement caused by the startling event.

"Though the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive." *Smith*, 456 Mich at 551. "The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate." *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003). Sheriff Deputy Jason Alexander, the officer who conducted the audio interviews, testified that they occurred not long after the shooting and that the witnesses were upset and in shock. That shock is evident in the audio recordings. As for the written statements, Richards testified that he was in shock and could not believe what had happened when he wrote his statement and Jon Gravelle testified that he was shaking when he wrote his statement and could not concentrate. Because the statements were clearly admissible, defense counsel was not deficient for failing to object to their admission. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

However, there is insufficient information on the record to determine when Julie Gravelle wrote her written statement and what her demeanor was at the time. As a result, it is unclear whether her statement would have qualified as an excited utterance. But even assuming that the statement was objectionable, defendant failed to establish that there was a reasonable probability that, but for defense counsel's failure to object, the outcome of trial would have been different given the weight of the evidence adduced. Further, Julie Gravelle's statement is essentially cumulative to her audio interview and her trial testimony.

Accordingly, defendant has failed to overcome the presumption that defense counsel was effective.

IV. STANDARD 4 BRIEF

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. BINDOVER

Defendant first asserts that the district court should not have bound him over on charges of open murder because there was insufficient evidence at the preliminary examination to support the charge. Although the original information charged defendant with open murder, it was amended before the preliminary examination to include a count for second-degree murder. At the preliminary examination, defendant acknowledged the amended information and waived a reading of the amended charges. Accordingly, defendant's argument fails because sufficient evidence at trial supported his conviction for second-degree murder and there is no indication that he was otherwise prejudiced by the claimed error. See *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990).

Defendant also appears to argue that he should have received a bill of particulars in this case in order to prevent unfair surprise, inadequate notice, and insufficient opportunity to defend himself. MCL 767.44 allows short forms to be used in an indictment, and further provides that "if seasonably requested by the respondent, [the prosecuting attorney] shall furnish a bill of particulars setting up specifically the nature of the offense charged." The trial court has discretion to grant a request for a bill of particulars and should do so when "such particulars are necessary to inform the defendant of the particular offenses intended to be proved against him." *People v Jones*, 75 Mich App 261, 269; 254 NW2d 863 (1977). However, a bill of particulars is not needed when the defendant has attended a preliminary examination and heard the attendant testimony, because participation in such process leaves the defendant "fully informed of both the nature and the elements of the charges against [the defendant]." *Id*. at 270. In other words, "[w]here a preliminary examination adequately informs a defendant of the charge[s] against him, the need for a bill of particulars is obviated." *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977).

In this case, defendant concedes that he did not request a bill of particulars. Furthermore, defendant attended the preliminary examination, heard the testimony, and was informed of the elements of the crimes with which he was charged. Accordingly, defendant suffered no prejudice for want of a bill of particulars.

Finally, defendant claims that the open murder charge raises serious questions about equal protection. However, because defendant only provided cursory statements in support of this claim, we decline to address it further. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

B. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial defense counsel was ineffective for several reasons. As indicated above, effective assistance of counsel is presumed and defendant bears the heavy burden of establishing ineffective assistance of counsel. *Solmonson*, 261 Mich App at 663. The "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

First, defendant asserts that defense counsel was ineffective for failing to "investigate law and fact." Although a defense attorney's failure to reasonably investigate a case can constitute

ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), defendant does not specify what facts and law counsel failed to investigate. Thus, defendant has failed to show either the requisite deficient performance by counsel or any resulting prejudice. See *Hoag*, 460 Mich at 6.

Next, defendant asserts that defense counsel was ineffective for failing to suppress or object to inadmissible opinion testimony. Defendant does not specify which testimony was allegedly inadmissible opinion testimony nor does he even direct the Court to which witnesses were allegedly making improper comments on defendant's guilt. Further, he does not offer any explanation as to how the allegedly improper opinion testimony resulted in prejudice. Accordingly, defendant has not met his burden of establishing either deficient performance or outcome determinative prejudice. See *id*.

Next, defendant asserts that trial counsel was ineffective for failing to request a bill of particulars. However, as indicated above, a bill of particulars was unnecessary because the preliminary examination adequately informed defendant of the charges against him. *Harbour*, 76 Mich App at 557. Therefore, any request by defense counsel would have been futile. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201. Additionally, defendant has failed to show how the lack of a bill of particulars affected the outcome of the proceedings. See *Hoag*, 460 Mich at 6.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald